No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the United States House of Representatives ("House"),[2] respectfully submits this brief because it has several compelling institutional interests in this case.

First, because each State's representation in the House is apportioned based on decennial census data, the chamber's very composition depends on an accurate and complete enumeration.

Second, census data guide the annual allocation of hundreds of billions of federal dollars to states and localities through programs enacted by Congress.

Third, this case directly implicates Congress's authority and obligations under the Constitution's Enumeration Clause, which imposes on Congress the duty to carry out an actual enumeration of the whole number of persons in the United States through a

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received timely notice of the filing of this brief and consented to its filing.

[2] The Bipartisan Legal Advisory Group ("BLAG"), which consists of the Speaker, Majority Leader, Majority Whip, Republican Leader, and the Republican Whip, "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the House of Representatives, 116th Cong. (2019), *available at* https://rules.house.gov/sites/democrats.rules.house.gov/files/116-1/116-House-Rules-Clerk.pdf. The Republican Leader and the Republican Whip do not agree with the merits discussion in this brief, but do agree that, if the Court chooses to grant review, it should resolve the matter expeditiously.

decennial census. *See* U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. Although Congress has delegated authority over the *mechanics* of the census to the Department of Commerce ("the Department"), Congress retains its constitutionally mandated duty to ensure an accurate "actual Enumeration" through the decennial census. *Id.* art. I, § 2, cl. 3. Accordingly, Congress has imposed both substantive limitations and procedural safeguards to ensure its effective oversight of the Department's conduct of this project.

In attempting to add a question about citizenship status to the 2020 Census outside the agency's ordinary processes and against the undisputed evidence that doing so would undermine the very purpose of the decennial census, the Department has disregarded both the substantive limitations and procedural safeguards that Congress created. Based on the administrative record, the district court conducted an extensive review of the Department's action; the court correctly concluded in a lengthy and extraordinarily thorough ruling that the Department acted unlawfully in departing from the careful framework that Congress has established for the conduct of the census.

Accordingly, if the Court chooses to hear this case, the House joins Respondents in urging the Court to set an expedited schedule and to affirm the district court's decision before the Department's June 2019 deadline for printing paper questionnaires for the 2020 Census.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari presents several questions, foremost among them whether the Department of Commerce's decision to add a citizenship question to the decennial census is subject to judicial review under the Administrative Procedure Act (APA),

5 U.S.C §§ 701 *et seq.* After carefully reviewing the Department's procedures, reasoning, and conclusions, the district court correctly held that the Department's addition of a question about citizenship status to the 2020 Census violated the APA because that decision was (1) "not in accordance with the law," (2) "arbitrary" and "capricious," and (3) justified by the Department on only pretextual grounds. Pet. App. 261a, 284a, 311a (quoting 5 U.S.C. § 706(2)(A)). According to the Department, however, its decision to add the citizenship question is unreviewable, even if the question will cause a significant undercount and thus thwart the Constitution's direction to obtain an accurate enumeration of the U.S. population. Pet. 19.

Congress did not and indeed could not confer such unchecked power on the Department. The Constitution vests Congress with the duty of conducting an "actual Enumeration" of "the whole number of persons in each State" every ten years. U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. Although Congress delegated authority to the Department to determine the manner in which the census is conducted, the Department cannot exercise its delegated power in a way that undermines the census's constitutional purpose: obtaining an actual enumeration of the country's total population.

To achieve that purpose, Congress included in the Census Act, 13 U.S.C. §§ 1 *et seq.*, both substantive limitations on the Department's authority and procedural safeguards that enable Congress to maintain oversight of the conduct of the census. The Department acted outside these statutory restrictions when it added a citizenship question to the 2020 Census questionnaire. In doing so, the Department violated the APA and undermined Congress's efforts to provide

a census that is administered in a way that fulfills Congress's constitutionally mandated duty.

Not only has the Department acted contrary to the Census Act and the APA, it has done so during the final stages of preparation for the 2020 Census, jeopardizing the orderly and timely resolution of this matter. If this Court chooses to hear this case, it should promptly do so and affirm the district court's sound decision, providing the country with much needed clarity regarding a vital cornerstone of our democratic institutions.

ARGUMENT

I. CONGRESS HAS A CONSTITUTIONAL DUTY TO CARRY OUT AN ACTUAL ENUMERATION OF THE WHOLE NUMBER OF PERSONS IN EACH STATE.

The Constitution's Enumeration Clause, as modified by the Fourteenth Amendment, confers upon Congress the responsibility to conduct every ten years an "actual Enumeration" of the whole number of persons in each State." U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. So long as Congress provides for a decennial census that is an actual enumeration, Congress enjoys broad discretion to "direct" the "Manner" in which the count is conducted. *Id.* art. I, § 2, cl. 3.

Rather than administer the census itself, Congress has delegated to the Department the task of "tak[ing] a decennial census of the population . . . in such form and content as [it] may determine." Census Act, 13 U.S.C. § 141(a). The Department characterizes the Census Act's delegation as so broad that it places all decisions about what questions may be included on the decennial census beyond the scope of judicial review.

Pet. 19. According to the Petition, the Census Act includes "no meaningful standard" to govern such decisions, giving the Department free rein to design and carry out the census as it pleases, regardless of the various violations of the law found by the district court. *Id.* (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988)).

The Department's claim is wrong. The Census Act's delegation is undoubtedly broad, but it is not unfettered. Rather, the Department cannot administer the decennial census in a manner that unreasonably deviates from the goal of actual enumeration established by the Constitution itself. *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (holding that the Department's conduct of the census must "bear . . . a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census"). This limitation is critical to Congress's constitutionally mandated duty to oversee the Department's production of an actual enumeration of the country's entire population—and, in turn, to the composition of the House itself.

The text of the Constitution combined with that of the Census Act circumscribes the Department's administration of the census. Congress placed into the Act substantive limitations on how the Department can exercise its delegated authority. One such limitation appears in § 6 of the Act, which requires the Department, when acquiring statistics for authorized purposes other than the actual enumeration, to "acquire and use information available from" federal, state, and local governments as well as third parties "instead of conducting direct inquiries" of census respondents. 13 U.S.C. § 6(c). Similarly, § 141(a)

permits the Department to gather only "necessary" information through the decennial census. *Id.* § 141(a). These limitations on the Department's power ensure that decennial census respondents are not overly burdened with questions that might reduce response rates. The district court, recognizing the substantive limitations on the Department that these statutory requirements impose, correctly held that the Department's insistence upon obtaining citizenship data through direct inquiry rather than through administrative records runs afoul of § 6(c), and that the administrative record lacks any explanation for the necessity of using the census to gather citizenship data. Pet. App. 268a, 294a–95a.

The Census Act also requires the Department to submit reports to Congress that enable the legislative branch to ensure, through oversight of the Department, that the census achieves an actual enumeration. Three years before the date on which each census commences, the Department is required to submit the first such report, identifying the "subjects" and "types of information" the Department intends to ask about in the census. 13 U.S.C § 141(f)(1). No later than two years before the census date, the Department must submit a second report to Congress detailing proposed census questions. *Id.* § 141(f)(2). If "new circumstances" arise that require "modifi[cation]" of the subjects and types of information identified in the (f)(1) report or the questions proposed in an (f)(2) report, the law allows the Department to propose a change of course, but the Department must provide Congress with a report that addresses the intended changes. *Id.* § 141(f)(3).

The Department failed to disclose any intention to ask a question about citizenship status in its March

2017 (f)(1) report. Pet. App. 33a. It included its proposed citizenship question in its March 2018 (f)(2) report, but it did not submit an (f)(3) report that informed Congress of the "new circumstances" that necessitated its submission of a question about a subject not identified in its (f)(1) report. Pet. App. 275a–76a. The district court correctly held that these failures by the Department violated the Census Act by untethering the Department from the critical oversight structure that Congress imposed to fulfill its constitutionally assigned role. Pet. App. 273a, 284a.

II. THE DEPARTMENT'S PROPOSED CITIZENSHIP QUESTION WILL OBSTRUCT THE ACTUAL ENUMERATION REQUIRED BY THE CONSTITUTION.

This case perfectly illustrates why the Framers specified an "actual Enumeration" as the standard governing the decennial census and why, to meet that standard, Congress limited the Department's discretion in the Census Act. As the district court found, the Department's own calculations revealed that inclusion of the proposed citizenship question will cause non-citizen households to respond to the census questionnaire at a rate more than *five percent lower* than other households, a gap that the Department acknowledges cannot be remedied by follow-up strategies. Pet. App. 45a, 53a. This shortfall likely will result in an incorrect apportionment of seats in the House of Representatives, harming the chamber's institutional integrity. Pet. App. 173a; *see also U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 87 (D.D.C. 1998) (holding that the House had standing to challenge the Department's use of statistical sampling based on the practice's effect on the chamber's composition), *aff'd* 525 U.S. 316 (1999).

Moreover, this substantial undercount will lead to the misallocation of federal funds that are distributed based on census data, according to congressional design. Pet. App. 178a.

Although it is true that "no census is recognized as having been wholly successful in achieving [the] goal" of actual enumeration, *Wisconsin*, 517 U.S. at 6, the Census Act's procedures and limitations are meant to achieve the realization of that goal to the greatest extent possible, consistent with Congress's constitutionally assigned responsibility. The Census Act therefore seeks to preclude the decennial census from undermining the purpose articulated by the Constitution: obtaining an actual enumeration of the country's total population. Because, according to the Department's own calculations, the 2020 Census will fall well short of the goal of actual enumeration if a citizenship question is included, the district court's decision finding inclusion of that question to be unlawful should be affirmed.

III. SHOULD THE COURT CHOOSE TO HEAR THIS CASE, EXPEDITED REVIEW IS NECESSARY.

According to the Department's own stated requirements, the paper questionnaires for the 2020 Census must be finalized for printing in June 2019. U.S. Census Bureau, U.S. Dep't of Commerce, *2020 Census Operational Plan: A New Design for the 21st Century* 72, 89 (Sept. 2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf. The question of whether the Department's proposed citizenship question will be included in the 2020 Census questionnaire therefore must be resolved before that deadline to ensure that the constitutionally required

decennial census will be conducted on time, as required by the Census Act. 13 U.S.C. § 141(a). Accordingly, should the Court decide to hear this case, it should set an expedited schedule for review.

This truncated timeframe for resolving the legal issues disputed in this case need not have occurred. As the district court recounted at length, the Department did not in its statutorily mandated March 2017 report to Congress identify citizenship status as one of the subjects that it intended the 2020 Census to address. The Department failed to do so even though, as the record in this case makes clear, Secretary of Commerce Wilbur Ross already had been discussing with Department staff the inclusion of a question on that subject. Pet. App. 33a, 78a–79a. Moreover, the Department did not notify Congress of the possibility of a citizenship question being included on the 2020 Census questionnaire until *a year later*, despite what the record now reveals to be the Department's ongoing and aggressive internal and external efforts to add the question. Pet. App. 120a.

Respondents took swift action in response to the Department's decision to add the citizenship question to the 2020 Census questionnaire, filing the first of the two cases in this consolidated action just eight days after the Department announced its decision. Pet. App. 34a. Such concern for the time-sensitive nature of this matter did not, however, characterize the Department's approach to this litigation. After the district court authorized discovery in the case, the Department waited several months before challenging that order. Pet. App. 37a. The Department also filed multiple petitions for mandamus challenging discovery orders and twelve requests to delay proceedings at a rate of approximately once per week between Labor

Day and Thanksgiving 2018. *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921 (JMF), 2018 WL 6060304, at *1 n.1 (S.D.N.Y. Nov. 20, 2018).

Whatever the Court decides to do in this case, it is critical that the matter be resolved before the June 2019 print deadline. A delayed resolution of this matter would harm not just the census and its credibility, but also the Congress, which has a constitutional responsibility to bring about a decennial census that counts all persons. This harm will be felt particularly by the House as the chamber that depends upon an accurate census for its own institutional integrity.

CONCLUSION

For the foregoing reasons, the House respectfully urges this Court to consider in deciding whether to grant the Department's Petition for a Writ of Certiorari the House's weighty interests in the timely resolution of this matter and in the proper conduct of the 2020 Census. In whichever appellate forum the Department's appeal is heard, the district court's ruling should be promptly affirmed.

Respectfully submitted,

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